

**Submission to the Department of Planning and
Environment's 2015 Discussion Paper entitled
*Expanding complying development to medium
density development***

4 April 2016

1. Opening

Local Government NSW (LGNSW) is the peak body for local government in NSW. It represents all 152 NSW general-purpose councils, associate members including 12 special-purpose county councils, and the NSW Aboriginal Land Council.

In essence LGNSW is the sword and shield of the NSW Local Government sector. LGNSW is a credible, professional organisation representing NSW councils and facilitating the development of an effective community-based system of Local Government in NSW. LGNSW represents the views of councils to NSW and Australian Governments; provides industrial relations and specialist services to councils; and promotes NSW councils to the community.

This submission is a response to the Department of Planning and Environment's 2015 Discussion Paper entitled *Expanding complying development to medium density development* (Discussion Paper). The Discussion Paper proposes that medium density development be classified as complying development under the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP), so that such development can be fast tracked by the certification process instead of being dealt with as a Development Application (DA) by the local council.¹ For the purposes of this policy medium density development is 2 to 10 unit development within a 2 storey envelope.

LGNSW appreciates the opportunity to comment on the discussion paper.

2. Executive Summary

LGNSW opposes the proposed policy in principle and practice. Such development requires assessment under the DA process to enable the management of design outcomes and potential impacts on streetscape and adjoining development.

The certification process is not suitable as an approval pathway for medium density development, as proposed under the new policy, as it will enable in-fill development of medium density, some of which may not be permissible in the zoning, to be approved by a private or council certifier.

LGNSW opposes the draft policy as:

- It would enable proposed development to circumvent local planning rules by complying with the state code, for the benefit of a more expedient assessment process.
- It excludes neighbours having the 'right to have a say in development next door'.
- The process would be reduced to a 'tick-the-box' assessment against the code, resulting in flat development where the applicant and certifier will have no responsibility to consider the context of the development beyond a compliance check against the common state-wide standards of the code.

These changes will override councils' zoning requirements under their Local Environmental Plan (LEP) and councils' development standards under their Development Control Plan (DCP), altering the density and character of low density residential zones.

¹ The proposed policy is outlined in One Part of the Missing Middle, Volume 1- Discussion Paper November 2015 and Volume 2, Background Paper, November 2015 (accessed on 9 March 2016 at http://planspolicies.planning.nsw.gov.au/index.pl?action=view_job&job_id=7407).

This policy is counter to the land use policy of many councils that choose to preserve the low density residential character of R2 and R3 zones by limiting medium and higher density residential development to precincts within close proximity to centres and transport nodes.

LGNSW therefore does not support the draft proposed policy and instead, recommends that:

- The Department consult with LGNSW and councils about developing more effective ways of assessing medium density development in association with the district and regional planning processes in NSW;
- The preferred option of developing a common template for Development Control Plans be explored with LGNSW and councils, on the basis that state and local planning controls would be an integral part; and
- Other options to fast track certain limited types of medium density development, where permissible with the zoning, are considered during the district planning process.

3. The proposal and key concerns

The proposal is to add a state wide medium density code to the current set of codes under the Codes SEPP, enabling specified forms of medium density development to be approved by a certifier as complying development, to increase of housing supply and choice as quickly as possible across NSW. This policy does not discriminate in terms of regions and currently is proposed to apply universally within all R2 and R3 zones.

The proposed policy will apply to the following 3 types of development, within a 2 storey envelope:

- Dual occupancies (dual occupancies within the existing envelope of a single dwelling can currently be converted to a dual occupancy under the Codes SEPP; the proposal is to expand these provisions to 2 unit development in all zones);
- Manor houses (4 units within a single building that includes 2 ground level and 2 upper level dwellings); and
- Terrace and town houses (2 stories) up to 10 units.

The most contentious aspects of the policy are as follows:

- It will override councils' zoning controls – and merge the requirements under R2 and R3 into one zone for many areas;
- It allows secondary housing to be permitted in all residential zones, and these applications would be eligible for strata subdivision below permissible allotment sizes which can lead to the sterilization of the site for further development;
- It enables manor houses to be permitted in low density zonings;
- It allows for 2 storey unit development of up to 10 units to be permissible in zones that currently do not permit that building typology;
- It mandates common planning controls for all medium density development of the class described in the policy irrespective of the locality; and
- It provides no means of allowing for local variations to the proposed development standards to accommodate local differences; and
- It excludes the rights of neighbours to provide comments on development next door.

4. Comments on certification process for medium density development

The process is rudimentary

The certification process requires a tick-the-box assessment for development that fits within a prescribed envelope. The assessor has no discretion to interpret the complying code against higher level planning principles or objectives under the wider planning framework, or local planning controls that have been developed by councils in consultation with communities. The process is undertaken with no reference to the local strategic framework and the planning controls for the area, but is restricted to the numerical standards of the Codes SEPP itself. There is no capacity for the certifier to consider siting, potential impacts on adjoining development, design, or the local or future character of the areas. This is required in a DA assessment process.

The Codes SEPP provides no allowances for local planning controls, such as differences in street setbacks for inner city and outer suburbs of Sydney, and variations in car parking and open space requirements. The process also cannot address issues of neighbourhood character and building design, let alone practical and locally based issues around the storage and removal of garbage from the site and shared easements. The proposal will result in 'cookie-cutter' development with no reference to the site or its context with adjoining development.

The process allows a dual consent process that is unwieldy

The process will also see the continuation of two sets of rules for medium density development; the medium density code under the Codes SEPP or councils' LEPs and DCPs.

The current layering of planning codes/controls under the NSW planning system was universally criticised in the recent Review of the Planning system.

In contrast, many jurisdictions across Australia enable state planning codes to combine state/local controls. This achieves a more cohesive outcome. For example, both the ResCode in Victoria and the R-Codes in WA both enable common state controls to be moderated by local variations and character statements in different ways. Both attempt to balance state consistency with local differences.

5. History of state-wide complying development codes

Progressive expansion and complexity

The Codes SEPP was introduced in 2008 for single storey houses on sites over 600 m² to allow small scale project home development to be fast tracked by the certification process. This was a newly developed process based on local government building assessment practice and the assessment process of former building applications (BAs). These applications were primarily for building permits that rarely required the assessment of planning matters.

The NSW Government also introduced the State Environmental Planning Policy (Affordable Rental Housing) 2009 that enabled complying development provisions for secondary dwellings that are often used in association with the Codes SEPP.

Since 2008 the Codes SEPP has been progressively expanded to cover additional planning and building matters. Legitimate questions have been raised regularly about the appropriateness of a certifier undertaking some of these forms of assessment and exercising regulatory power.

The codes themselves have become increasingly detailed. This has resulted in complex and hard-to-navigate codes, discouraging their use. Many councils have reported that applicants prefer the DA process as it allows for flexibility and local controls are easier to understand. In addition, council staff provide helpful advice and guidance on the requirements for DAs.

The codes result in conflicting outcomes

Nevertheless, the state codes are often used where the applicant considers council's DCPs are too strict. Here the Codes SEPP offers a benefit to the applicant. The Codes SEPP provides the applicant a way of breaking the local controls and enabling the certifier to approve development that is larger and therefore likely to be out-of-keeping with local standards. This is a bizarre system that enables the developer to choose between two sets of rules for the same piece of land and decide who is the consent authority.

LGNSW is concerned that introduction of the draft policy proposal will be a defacto way to ascertain whether the community will support a certifier as the appropriate decision maker for low scale medium density development, before higher and more intrusive forms of medium and higher density development are added to the Codes SEPP. This has been the approach of the Department since the introduction of the Codes SEPP in 2008.

6. LGNSW Position on complying development

LGNSW supports the use of complying development as a means of fast tracking low risk development where the development is suitable for a 'tick the box' assessment process that primarily constitutes a building assessment with few planning considerations.

LGNSW has consistently opposed the expansion of complying development:

- where the development is likely to impact on adjoining land. For example including small lot development within the NSW Housing Code was opposed due to the adverse impacts on adjoining development;
- to other forms of development that are not low risk, for example large scale commercial development that warrants robust fire safety assessment.

LGNSW has also strongly argued for a system that enables local development standards being taken into account alongside the Codes SEPP so that the codes would be more aligned to the development standards within council's DCP. This would assist in closing the gap between the state and local provisions and ameliorating the dual rules process that has eventuated. LGNSW has strongly advocated for local variations between state and local planning controls to be included in the Codes SEPP. These variations can be invisibly incorporated into the state wide codes through the ePlanning portal.

7. Summary of objections to the draft policy

a. Expanding the certification process to more intrusive forms of development is unnecessarily risky

LGNSW has continually questioned the independence and rigor of the certification process. A private certifier has a fundamental conflict of interest in undertaking his or her public responsibilities as a regulator and providing the service for his or her client for a fee.

Local Government NSW opposes in principle the expansion of the certification process to a wider range of development including medium density development, and questions the benefits of applying state-wide controls for such development, as opposed to having a more tailored local approach.

While the Discussion Paper may identify some council examples where the DA process has not resulted in optimum planning outcomes, it does not follow that the certification process will achieve better outcomes. The *Independent Review of the Building Professionals Act* has clearly outlined current serious weaknesses of the certification process that are yet to be addressed.

b. Overrides councils' LEP

LGNSW opposes any policy change that enables medium density development to be approved by a certifier where it is not permissible in the zoning. These types of activities are local activities and under council discretion to manage. The certification process should not be able to create an avenue for prohibited development to become permissible.

Nearly every council across NSW now has in place a new comprehensive LEP, that has been publicly exhibited and approved by the Planning Minister in recent years. It is unreasonable for the NSW Government to override these plans.

c. Medium density development requires planning consent

The 'tick the box' checklist assessment process undertaken by the building certifier is not suitable or rigorous enough for such development types. The DA process enables a 'performance based' approach to be used for medium density development that takes into account the siting and potential impacts of the proposed development on the locality and adjoining properties. These developments can be complex and they can be situated between existing low density development. As such, careful consideration of the impacts is required. The local and future character of the street and potential impacts on adjoining property are of critical importance in assessing the appropriateness of the scale and siting of proposed development. The DA process provides greater flexibility for the applicant and can enable councils to seek better design outcomes, where justified. The necessary decisions are not primarily building decisions but planning decisions and hence are more appropriately made on the advice of planning staff.

d. Community opposition to the proposal is excluded

The proposed policy denies community involvement in local planning decisions for medium density development. These developments are currently processed as DAs that allow neighbours to have a right to comment on the proposed development 'next door'. The certification process provides for neighbours to be notified but they have no right to comment.

Denying neighbours the right to be involved in decisions on medium density development is likely to be counter-productive in achieving more densification of the city because community sensitivity and concern will be heightened.

Given that Sydney and other regional areas are under pressure to grow, low scale medium density development offers the potential for a compatible and low rise building typography in certain areas. However, enabling a certifier to approve such development without consultation with neighbours is likely to feed distrust in the community about the suitability of these types of development.

e. Undermines strategic planning process

The proposed policy will undermine the district plan making process that is identifying areas for housing growth across Sydney. The proposed policy will introduce a 'scattergun' or 'free for all' approach that will enable medium density development to be approved across all areas, overriding councils' LEPs and DCPs with no consideration of the local infrastructure's capacity to manage change. This policy opposes a well established planning principle that encourages growth near transport nodes.

8. Alternative approaches

LGNSW strongly opposes the proposed policy and would like to offer the following alternative approaches.

a. A common template for Development Control Plans is developed in consultation with LGNSW and councils that combines state and local planning controls.

LGNSW supports the development of a common template for a DCP for medium to high rise development in partnership with the sector. This would be based on the proviso that such a code would constitute a composite of common (state-wide) and local planning controls, providing more standardisation.

The proposed template would provide a format and an agreed approach in structuring a DCP for medium and high rise development that would be based on:

- a performance based approach to local plan making that provides flexibility and certainty to local assessment processes;
- identification of the planning/design objectives;
- setting performance criteria that must be satisfied for the objectives to be met; and
- setting acceptable development standards to meet the performance criteria.

This would enable an application that strictly complies with the acceptable development standards to be approved with more certainty by council.

b. Apply a DCP for medium density development on a place-by-place basis in association with the District Plan.

A draft DCP for medium density development could be developed based on extensive community engagement during the preparation of the District Plans. This process would ensure that such a code was applied to specific areas where that development is permissible and tailored to its local context.

c. A design guide for medium density development be prepared

Many councils have indicated that there is a policy gap for design guidelines on medium density development that falls below the threshold for the *Apartment Design Guide* under State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development. This could be prepared in association with the common template for the DCP.

9. Conclusion

LGNSW considers that the draft proposal to introduce medium density development to the certification process is fundamentally flawed.

LGNSW recommends that the current draft policy to adopt a state-wide complying code for medium density development be abandoned.

Instead, LGNSW recommends that:

- The Department consult with LGNSW and councils about developing more effective ways of assessing medium density development in association with the district and regional planning processes in NSW;
- The preferred option of developing a common template for Development Control Plans be explored with LGNSW and councils, on the basis that state and local planning controls would be an integral part; and
- Other options to fast track certain limited types of medium density development, where permissible with the zoning, are considered during the district planning process.